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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

GARNETT BESENTHAL, Plaintiff and Appellant, v. EL PASO MERCHANT ENERGY CORPORATION et al., Defendants and Respondents.	C049713 (Super. Ct. No. CV021627)

Plaintiff appeals from a judgment of dismissal entered after the trial court granted defendants' motion for summary adjudication on five out of six causes of action of the complaint and plaintiff voluntarily dismissed the remaining claim. Plaintiff contends issues of fact exist on her claims for gender discrimination, hostile work environment, retaliation, and intentional infliction of emotional distress. We agree as to her hostile work environment claim only and reverse the judgment in part.

FACTS AND PROCEEDINGS

On review of an order granting a defendant's motion for summary adjudication, we construe the evidence in the light most favorable to the plaintiff. (See *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) However, we do not consider evidence to which the trial court sustained an evidentiary objection. (Code Civ. Proc., § 437c, subd. (c).) In its statement of decision, the trial court sustained a number of evidentiary objections. Undeterred, plaintiff has submitted an appellate brief containing a statement of facts that repeatedly cites evidence expressly rejected by the trial court. Defendants have done the same, but on a much smaller scale. Neither party has challenged the trial court's evidentiary rulings. On this appeal, we shall consider only evidence that was not rejected by the trial court.

On January 29, 2000, defendant El Paso Merchant Energy Corporation (El Paso) took control of nine electrical cogeneration power plants in California from Dynergy Power Operations (Dynergy). At the time, plaintiff was working as an instrument & controls technician (ICT) for Dynergy. She was offered and accepted the same job with El Paso at its McKittrick plant in Kern County. As part of this job, plaintiff worked one week a month at another El Paso plant in San Joaquin County, which had no resident ICT.

In January 2001, plaintiff's manager asked if she would be interested in a promotion to lead operations specialist (LOS) at

the San Joaquin plant. Plaintiff spoke with the manager of the San Joaquin plant, defendant David McKenzie, who indicated he wanted her for the position because of her work experience. Plaintiff was told she would be doing both the LOS and ICT jobs but that, when the San Joaquin facility became fully staffed, she would perform only the LOS job and would train operators to perform some of the ICT functions until a permanent ICT was hired. Plaintiff accepted the promotion.

Before beginning the new job, plaintiff was at the San Joaquin plant doing ICT work when McKenzie informed the plant operators about plaintiff's promotion. The operators, who were all male and would be working under the LOS, were not happy about it. They informed McKenzie they should have been given an opportunity to apply for the position. One of the operators, Marty Butler, announced on the plant's intercom system, in a negative tone, either "Congratulations, Garnett" or "Congratulations, Mom." Plaintiff also found a note on the door of the LOS's office that said "Mom's Pad." The male employees stopped speaking to plaintiff in a friendly way.

After plaintiff returned to Kern County, she expressed her concerns to McKenzie about the operators' reaction to her promotion. She told McKenzie he could take back the job offer. McKenzie told plaintiff she was the only one qualified for the position and that he would make it work.

Plaintiff began her new job on February 12, 2001. The LOS job required her to supervise the day-to-day operations of the plant, including scheduling employee time, assigning work,

assigning preventive maintenance, scheduling extra assistance during power outages, and scheduling paid time off. Although plaintiff was required to do both the LOS and the ICT job, it was not unusual for El Paso employees to perform multiple jobs.

Three days after plaintiff started her new job, McKenzie left on vacation. Two operators called in sick the next day and another was already on vacation, leaving her with only one operator and one mechanic to run the plant. From the day plaintiff started her new job, the operators bypassed her about work matters, and this got worse over time.

On February 14, 2001, plaintiff called an ICT at another plant, Jeff Hardin, and asked if he would be interested in coming to San Joaquin to help with a scheduled power outage. She told Hardin he would have to get approval from the LOS's where he worked. Plaintiff was later accused of not following the proper chain of command in requesting assistance. McKenzie told plaintiff that other plant managers were watching her for not following the proper chain of command.

On March 23, 2001, McKenzie informed plaintiff an anonymous letter had been placed on the desk of Todd Witwer, McKenzie's boss, telling Witwer he needed to watch plaintiff's overtime. Later, she was required to explain and document her overtime to McKenzie.

On April 5, 2001, plaintiff complained to McKenzie about a rumor spreading through the plant that she was having an affair with the one operator in the San Joaquin plant who was not treating her badly. She also complained about rumors that she

got promoted because she was having an affair with McKenzie, she received a $10,000 bonus for taking the job, and she was being paid $38.00 per hour. McKenzie told plaintiff to talk to Marty Butler concerning the rumor about an affair with one of the operators. However, when she did so, Butler became irate and McKenzie had to be summoned. McKenzie discussed the matter with them and said he did not want to hear any more about it.

On May 5, 2001, McKenzie conducted a meeting with plaintiff and the operators. During the meeting, Tom Johnson, the plant mechanic, yelled that everything was fine until plaintiff arrived. McKenzie did not respond to the outburst. Later, McKenzie told plaintiff something to the effect that the "guys" were unhappy working for a woman and that some "guys" just have a problem working for a woman.

On July 9, 2001, plaintiff told McKenzie she was concerned about operators working overtime without approval. McKenzie told the operators they needed to clear unscheduled overtime with plaintiff. Thereafter, most of the operators refused to work any unscheduled overtime.

On or about August 15, 2001, McKenzie told plaintiff that Witwer wanted the vibration system on a turbine engine in the San Joaquin plant tested by an outside contractor during a plant outage scheduled for September 9. Plaintiff obtained an estimate for the work and requested approval from Witwer. On or about August 28, McKenzie instructed plaintiff to "hold off" on the test. On or about November 15, plaintiff inquired of McKenzie about funding for the vibration test. On November 20,

she received approval to have the test done during a scheduled power outage on December 3. However, on or about November 29, the engine suffered a "catastrophic failure" that cost $1.9 million to fix. Plaintiff later heard that the operators were blaming her for the failure because she had not had the system properly tested.

Around August 2001, Witwer informed plaintiff that one of the job duties of an LOS was to review and approve employee time cards. She asked McKenzie for authority to do employee time cards, and McKenzie promised to get her such authority and a password to access the computer system. McKenzie never followed through with this promise. However, McKenzie did give plaintiff his password to gain access to the time card system.

At the end of 2001, plaintiff received an overall employee evaluation from McKenzie of "Significant Contributor," the highest evaluation possible.

On January 8, 2002, plaintiff complained to Witwer and Nuala Cullinane of El Paso's human resources department about being blamed for the engine failure, the rumors at the San Joaquin plant and other matters she had previously reported to McKenzie. On January 11, Witwer told plaintiff he and Cullinane were coming to San Joaquin to address the rumors. Plaintiff responded that she did not think a meeting was sufficient and requested a formal statement that she was not the cause of the engine failure.

On January 16, Witwer and Cullinane conducted a meeting of employees at the San Joaquin plant in which they told employees

not to spread rumors. They did not address plaintiff's other concerns.

On January 22, 2002, plaintiff took a medical leave of absence because of lower back pain. When plaintiff returned to work on July 16, 2002, McKenzie told her she would no longer be responsible for scheduling of operator time or the maintenance program. Plaintiff complained to McKenzie about having her duties taken away, and McKenzie said, "well, it's not been working." However, McKenzie acknowledged problems had not gone away while plaintiff was on medical leave. On August 9, 2002, McKenzie restored the scheduling and maintenance functions to plaintiff.

On September 11, 2002, plaintiff overheard an operator asking someone on the telephone about operations matters. She later told the operator to come to her with such questions and also reported the matter to McKenzie.

In September 2002, Tom Johnson yelled at plaintiff in a safety meeting. McKenzie was present and did nothing about it. This happened again in October. On October 30, 2002, Johnson yelled at plaintiff about getting him help the next day. The next day, Johnson again yelled at her. When plaintiff tried to change the schedule, Johnson complained to her about it.

In October 2002, McKenzie began preparing plaintiff's annual employee evaluation. He rated her a "Key Contributor," a notch below her evaluation of the prior year.

In a November 14 meeting, plaintiff informed the operators about work to be done over the weekend. The operators complained, and McKenzie told them he would work it out.

On December 5, 2002, Victoria Irvine, of El Paso's human resources department, called plaintiff and asked her about allegations made by Tom Johnson that she had sexually harassed him. Johnson alleged plaintiff touched him inappropriately and made improper comments on other occasions. Irvine suggested to plaintiff that it is a good policy to give employees a three-foot space. At the suggestion of the human resources department, McKenzie asked plaintiff to work at the McKittrick plant while they evaluated Johnson's charges. However, because this was around Thanksgiving and plaintiff wanted to remain in San Joaquin County with her family, she asked instead for time off. McKenzie allowed her to take a week off. Irvine eventually told plaintiff she found nothing to substantiate Johnson's claims.

On December 9, 2002, plaintiff began another medical leave. On January 7, 2003, plaintiff sent Irvine a lengthy e-mail message describing all of her complaints against the company and its employees.

On January 8, 2003, Irvine conducted a "communication and team building" meeting with the employees at the San Joaquin plant. Plaintiff did not attend on doctor's orders.

Plaintiff filed a complaint with the Department of Fair Employment and Housing (DFEH) on February 24, 2003. El Paso received notice of the complaint on April 4, 2003. On April 7,

Irvine sent plaintiff a letter indicating plaintiff's leave credits under the Family Medical Leave Act had been exhausted the prior month and, since plaintiff was not scheduled to see a doctor until July 2003, El Paso was going to post her job to be filled as soon as possible. Irvine informed plaintiff that, once she was released to return to work, the company would initiate a search for a comparable position.

Plaintiff filed this action against El Paso, McKenzie, and Irvine on August 8, 2003. The complaint alleges breach of contract, gender discrimination, age discrimination, hostile work environment, retaliation, and intentional infliction of emotional distress. Plaintiff subsequently dismissed her claims against Irvine. The trial court granted summary adjudication to the remaining defendants on all but the breach of contract claim. Plaintiff thereafter dismissed her claim for breach of contract and entered judgment for El Paso and McKenzie.

DISCUSSION

I

Introduction

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty . . . ." (Code Civ. Proc., § 437c, subd. (f)(1).) A motion for summary adjudication works the same as a motion for summary judgment, except it applies to a single cause of action, affirmative defense, claim for damages, or issue of duty.

(*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.) We review rulings on motions for summary judgment or summary adjudication de novo, applying the same rules as the trial court and "'"considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."'" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

"A motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law. In determining whether the papers show . . . there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, . . . and all inferences reasonably deducible from the evidence . . . .' ([Code Civ. Proc.,] § 437c, subd. (c).) A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show . . . a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . . (*Id.*, subd. (o)(2) . . . .)" (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.)

In assessing the merits of a defendant's motion for summary judgment or summary adjudication, "we liberally construe plaintiffs' evidentiary submissions and strictly scrutinize

defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

Plaintiff challenges the court's grant of summary adjudication on the second (gender discrimination), fourth (hostile work environment), fifth (retaliation), and sixth (infliction of emotional distress) causes of action. She has abandoned her claims for age discrimination and breach of contract. Plaintiff contends the court went beyond determining whether issues of fact exist and considered the persuasiveness of the parties' evidence in concluding defendants are entitled to summary adjudication. We shall consider this contention in connection with plaintiff's individual causes of action.

II

Gender Discrimination

In her second cause of action, plaintiff alleges she was "systematically subjected to differential treatment, and terms and conditions of employment based on [her] sex, in violation of" the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). According to plaintiff, she was subjected to various discriminatory and harassing acts "with the intent to motivate [her] to take a medical leave of absence," and management personnel at El Paso failed to take appropriate action to prevent this from occurring. Plaintiff alleges her treatment by defendants was motivated by her sex.

The trial court concluded plaintiff's gender discrimination claim should be limited to conduct occurring within one year of the date she filed her claim with the DFEH. An administrative complaint must be filed within one year of an alleged FEHA violation. (Gov. Code, § 12960, subd. (d).) The court further concluded plaintiff failed to present evidence that she was subjected to any adverse employment action during this period or that any such action was motivated by her sex.

Plaintiff contends the trial court erred in considering only acts committed within one year of her DFEH claim. She argues she was subjected to a continuing violation throughout her employment at the San Joaquin County plant and defendants did not make clear their intention to continue mistreating her until less than a year before she filed her claim.

Where an employer engages in a pattern of conduct creating a hostile work environment, it is appropriate to consider that conduct as a continuing violation. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at pp. 1058-1059.) Failure to eliminate a hostile work environment targeting a particular employee amounts to a continuing violation if the employer's actions are "(1) sufficiently similar in kind . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.) A complaint alleging a continuing violation is timely "if *any* of the discriminatory practices continues into the limitations period." (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 349.)

Defendants contend the continuing violation theory applies only to claims of harassment, which would include creation of a hostile work environment (*Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at p. 348), and not to claims of discrimination. Although harassment is generally viewed as a form of discrimination (*ibid.*), the FEHA prohibits discrimination and harassment under different provisions. Subdivision (a) of Government Code section 12940 makes it unlawful "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges or employment." Subdivision (j)(1) of the same section makes it unlawful for an employer, because of a prohibited basis, "to harass an employee, an applicant, or a person providing services pursuant to a contract."

In *Reno v. Baird* (1998) 18 Cal.4th 640, 657, the state high court relied on the distinction between discrimination and harassment under the FEHA in concluding that supervisory employees may be held liable for the latter, but not the former. Quoting from *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63-65, the high court explained: "'[H]arassment consists of a type of conduct not necessary for performance of a

supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job. [Citations.]

"'Discrimination claims, by contrast, arise out of the performance of necessary personnel management duties. While harassment is not a type of conduct necessary to personnel management, making decisions is a type of conduct essential to personnel management. While it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid making personnel decisions or to prevent the claim that those decisions were discriminatory. [¶] . . . [¶]

"'We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper

motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management.'" (*Reno v. Baird*, *supra*, 18 Cal.4th at pp. 645-647.)

In *National Railroad P. Corp. v. Morgan* (2002) 536 U.S. 101 [153 L.Ed.2d 106], the United States Supreme Court concluded the continuing violation doctrine does not apply to claims of discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). According to the court, discrimination claims involve discrete acts of mistreatment. Even where multiple discrete acts are related, only those that occurred within the statutory period are actionable. (*Id.* at pp. 110-115 [153 L.Ed.2d at pp. 120-123].) Claims based on a hostile work environment, on the other hand, necessarily involve repeated conduct that cannot be said to occur on a particular day. "Such claims are based on the cumulative effect of individual acts." (*Id.* at p. 115 [153 L.Ed.2d at p. 123].) A claim based on a hostile work environment is timely if any act that is part of the environment occurred within the statutory period. (*Id.* at p. 118 [153 L.Ed.2d at p. 125].) California courts often look to federal decisions interpreting title VII for assistance in interpreting the FEHA. (*Reno v. Baird*, *supra*, 18 Cal.4th at pp. 647-648.)

Defendants contend, in any event, that application of the continuing violation doctrine to plaintiff's discrimination

claim is irrelevant because plaintiff failed to present any evidence of adverse employment action taken more than a year before her DFEH claim. We agree.

In support of her discrimination claim, plaintiff asserts she "complained on numerous occasions regarding [defendants'] treatment of her to no avail. In fact, [defendants] retaliated against [plaintiff] for complaining of sex discrimination which is clearly a violation of the FEHA. Furthermore, [defendants] in this case admitted they did absolutely nothing to eliminate the discriminatory treatment. Indeed, the harassment and discrimination by [defendants] not only continued up to the time [plaintiff] went out on stress leave, but subsequent to that as well when [defendants] terminated [plaintiff's] employment. [¶] Furthermore, [defendants] in this case were well aware that [plaintiff's] coworkers treated women differently than men and refused to take any steps to eliminate the discriminatory treatment."

The foregoing assertions do not support a claim of discrimination. Rather, they allege harassment and retaliation in that defendants failed to take steps to eliminate misconduct by plaintiff's coworkers. We shall address plaintiff's hostile work environment and retaliation claims in the following sections.

Plaintiff further asserts in support of her discrimination claim that she presented evidence defendants "stripped [her] of her job duties, caused her to go out on a stress related leave of absence, fail[ed] to eradicate the discriminatory environment

and . . . terminat[ed] [her] employment." Of these, the only acts that could arguably support a claim of discrimination are that defendants stripped plaintiff of her job duties and terminated her employment. The other assertions relate to her hostile work environment claim.

The only evidence that defendants stripped plaintiff of her job duties is her declaration that, upon plaintiff's return from medical leave for back surgery, McKenzie informed her that she would no longer be responsible for scheduling operators, she was to delegate the maintenance program to another, and she would still not be responsible for time cards. These all occurred within a year of plaintiff's DFEH claim. However, plaintiff acknowledged that after she complained to McKenzie about the job reassignments, he returned the scheduling and maintenance functions to her. Since plaintiff never had the time card function, this cannot be considered an elimination of job duties.

To be actionable, an adverse employment action "must materially affect the terms and conditions of employment." (*Yanowitz c. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1051, fn. 9.) While this may include more than just "'ultimate' employment acts, such as a specific hiring, firing, demotion, or failure to promote decision," it nevertheless requires "a substantial adverse change in the terms and conditions of the plaintiff's employment." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455.) "A change that is merely contrary

to the employee's interests or not to the employee's liking is insufficient." (*Ibid.*)

In this instance, plaintiff was deprived of certain job duties for a brief period after her return from disability leave. There is no evidence that plaintiff's compensation or other terms and conditions of employment were adversely affected or that she was otherwise harmed by this action. Under these circumstances, it can hardly be said the temporary reassignment of job duties materially affected the terms and conditions of plaintiff's employment.

As for plaintiff's termination, there is no evidence this ever occurred. In his declaration, McKenzie states plaintiff commenced a second medical leave of action on December 8, 2002. Irvine states plaintiff called her on December 9 and informed her she had commenced a medical leave of absence. Irvine further states plaintiff could not attend a "communication and team building session" on January 8, 2003, because her doctor would not release her. Plaintiff called Irvine on January 13, 2003, and indicated she was going to obtain a doctor's release to return to work. However, there is no indication this ever occurred.

In her statement of facts, plaintiff asserts her job duties were modified by McKenzie while she was on medical leave such that she "would no longer be qualified to return to her position of Lead Operations Specialist." However, the only evidence cited in support of this assertion is a document entitled "Lead Operators Job Expectation" with an issue date of January 23,

2003. However, we can discern nothing from this document to suggest it is a change from plaintiff's job before she went on medical leave or that it rendered her unqualified for the LOS job.

Plaintiff next asserts that on April 7, 2003, while plaintiff was still on medical leave, McKenzie sent Irvine a copy of the DFEH complaint plaintiff had filed. That same day, Irvine sent plaintiff a letter indicating plaintiff's position was being filled and that plaintiff had exhausted her leave credits under the Family Medical Leave Act. That letter states plaintiff had informed Irvine she would not see her doctor again until July 1, 2003, and was still not released to return to work. Irvine indicated: "Due to the needs of the San Joaquin plant, it has been determined that the lead position will be posted and filled as soon as possible." However, the letter went on to state: "As stated in El Paso's policy, the Company will make a reasonable effort to place a returning employee in their previous position or one similar position." The letter concluded: "When your doctor releases you to return to work, contact me and I will initiate a search for an appropriate position. . . ." There is no suggestion in any of this that plaintiff's employment had been terminated.

Finally, plaintiff asserts that male employees had been allowed to return to their former positions after being out on medical leave for a substantially longer period than allowed under the Family Medical Leave Act. However, the evidence

plaintiff cites in support was subject to an evidentiary objection that was sustained by the trial court.

The foregoing evidence does not support plaintiff's claim that her employment with El Paso was terminated. There being no other evidence to support plaintiff's discrimination claim, the trial court did not err in granting summary adjudication on plaintiff's gender discrimination cause of action.

III

Hostile Work Environment

As noted previously, the primary thrust of plaintiff's claim is that she was subjected to a hostile work environment because of her gender. In her complaint, plaintiff alleged she was required to do both the LOS and ICT job at the San Joaquin County plant. She further alleged her younger, male subordinates resented her promotion to the LOS job, she was subjected to "abusing, harassing and discriminating behavior," she complained to McKenzie and the human resources department to no avail, work restrictions were placed on her following a complaint of sexual harassment by one of her subordinates, and her job was eventually posted to be filled by another.

Plaintiff asserts in her opening brief that, when she complained to El Paso's human resources department, "she was immediately stripped of her job duties." However, plaintiff cites nothing to support this assertion. On the contrary, the only evidence of restrictions placed on plaintiff concerns the temporary reassignment of some duties following plaintiff's

return from medical leave and the temporary restrictions imposed while the human resources department investigated the sexual harassment claim of Tom Johnson.

To the extent there is evidence in the record that plaintiff was required to perform two jobs at the San Joaquin County plant, there is no evidence this was because of her gender. Furthermore, there was undisputed evidence this was a common practice at El Paso.

However, plaintiff did present evidence that the treatment she received from subordinates was motivated by her gender. It is undisputed most of the operators at the San Joaquin plant resented the fact plaintiff had been given the LOS job. Following notification of the promotion, one of the operators yelled over the intercom in a negative tone either "congratulations Garnett" or "congratulations Mom" and placed a note on the door of the LOS's office saying, "Mom's Pad." McKenzie later told plaintiff the male employees were not happy she was given the promotion and the "guys" were unhappy working for a woman. Rumors spread that plaintiff was having an affair with the one operator who was not treating her badly and with McKenzie.

Of course, plaintiff's hostile work environment claim is not based on the actions of her coworkers alone. Her lawsuit is against El Paso and McKenzie. Her claim is thus based on the fact these defendants failed to do anything about the misconduct of her subordinates. At a meeting attended by plaintiff and McKenzie, Tom Johnson yelled that everything was fine until

plaintiff arrived at the plant. McKenzie made no response to the outburst. Johnson also yelled at plaintiff at other meetings, and McKenzie made no attempt to stop him. When plaintiff complained to Irvine about the matter, Irvine did not do a "full-fledged investigation."

Defendants argue that, where the same person involved in the decision to hire the person alleging discrimination is also involved in later adverse employment action against that person within a relatively short period of time, there is a strong inference discriminatory animus was not a motivating factor. In *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, the court explained: "'One is quickly drawn to the realization that "[c]laims that employer animus exists in termination but not in hiring seem irrational." From the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."'" (*Id.* at p. 809, quoting *Proud v. Stone* (4th Cir. 1991) 945 F.2d 796, 797.)

However, plaintiff's claim does not turn on McKenzie's motivation. The FEHA provides: "Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).) Employers must "take all reasonable steps to prevent

harassment from occurring." (*Ibid.*) The FEHA prohibits harassment by a coworker based on race, religion, sex or the like. Liability exists only where the coworker has a discriminatory motive. However, as for the employer, it is enough that supervisory employees were aware of the misconduct but failed to take immediate and appropriate corrective action. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046.) The supervisor's motivation is immaterial.

Although the record contains evidence of some efforts by defendants to resolve the problems, defendants never took any disciplinary action against plaintiff's subordinates. In order to avoid liability under the FEHA, the employer must take remedial action reasonably calculated to end the harassment. (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 881; *Katz v. Dole* (4th Cir. 1983) 709 F.2d 251, 256.) When the harassment continued despite defendants' efforts to stop it, they were required to take more severe action. They failed to do so.

Defendants contend plaintiff may not rely on the continuing violation doctrine to support her hostile work environment cause of action with conduct that occurred more than a year before she filed her DFEH claim. Although the continuing violation doctrine has particular application in hostile work environment cases, defendants argue the doctrine may be used only if misconduct occurring outside the limitations period "is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 802.) Defendants assert there is no evidence of

unlawful conduct within the statutory period that has any relation to plaintiff's gender.

We disagree. Plaintiff presented evidence that the mistreatment she received at the hands of her subordinates was motivated by their displeasure in working for a woman. McKenzie so stated. Plaintiff presented evidence that the mistreatment continued well into the statutory period. On several occasions during the Fall of 2002, Tom Johnson yelled at plaintiff and McKenzie did nothing about it. Johnson also charged plaintiff with sexual harassment, a charge Irvine was unable to substantiate. Since plaintiff complained to Irvine in January 2003 about the rumors of sexual affairs, it may be assumed those rumors persisted. Plaintiff asserted the operators bypassed her on operational matters and this got worse over time.

Standing alone, these acts might not make out a claim for sexual harassment. "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. [Citation.]" (*Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57, 67 [91 L.Ed.2d 49, 60].) For harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' [Citation.]" (*Ibid.*) On the other hand, it is enough "if [the] hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." (*Steiner v. Showboat Operating Co.* (9th Cir. 1994)

25 F.3d 1459, 1463.) "The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

The conduct of plaintiff's subordinates, and defendants' responses thereto, during the year prior to the filing of plaintiff's DFEH claim must be viewed in light of her overall treatment while at the San Joaquin County plant. The more recent conduct was merely a continuation of the whole. The evidence, viewed in the light most favorable to plaintiff's claim, is sufficient to raise a triable issue of fact as to whether that conduct was sufficiently severe to alter the conditions of plaintiff's employment and make it difficult for her to do her job.

Defendants contend plaintiff's hostile work environment claim reached a state of permanence more than a year before she filed her DFEH claim and is therefore barred. As explained earlier, the continuing violation doctrine applies only until the employer's actions have acquired a degree of permanence. (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823.) Such permanence is established when "an employer's statements and actions make clear to a reasonable employee that any further

efforts at informal conciliation to . . . end harassment will be futile." (*Ibid.*) Defendants contend this point was reached more than a year before plaintiff filed her DFEH claim.

We are not persuaded. When plaintiff complained about employees circumventing her authority or rumors about affairs, defendants made some ineffectual efforts to do something about it. As late as January 2003, Irvine conducted a communications and team building session among the San Joaquin County employees. Although none of plaintiff's subordinates was ever disciplined, efforts were made to try to resolve the problems short of discipline. Given the evidence presented on the motion, it cannot be said the circumstances reached a state of permanence.

Because the evidence, viewed in the light most favorable to plaintiff, shows conduct by plaintiff's coworkers that interfered with plaintiff's ability to do her job and was motivated by plaintiff's gender, and defendants did not do enough to stop the misconduct, El Paso was not entitled to summary adjudication on plaintiff's hostile work environment claim.

However, summary adjudication was properly entered in favor of McKenzie. As a supervisor, McKenzie has no personal liability unless he himself engaged in the harassing activity. (*Reno v. Baird*, *supra*, 18 Cal.4th at pp. 645-647.) Here, there is no evidence McKenzie harassed plaintiff or that his failure to take appropriate corrective action was motivated by discriminatory animus.

IV

Retaliation

Plaintiff contends the trial court erred in granting summary adjudication on her retaliation claim. In the fifth cause of action, plaintiff alleges Irvine and McKenzie retaliated against her in December 2002 for filing complaints of sex discrimination. According to plaintiff, they retaliated by causing her to take a medical leave and placing unreasonable and punitive work restrictions on her. The trial court concluded there was no evidence any adverse employment action was taken against plaintiff. The court further concluded plaintiff's retaliation claim was barred because she failed to assert retaliation in her DFEH claim. Plaintiff contends both conclusions are incorrect.

As with a claim of discrimination, a claim of retaliation requires evidence that the employee was subjected to adverse employment action. (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1453.) Inasmuch as we have already concluded plaintiff failed to present evidence of such action, we need consider her retaliation claim no further. Plaintiff's assertion that she was retaliated against by defendants has no basis in the evidence presented in connection with defendants' summary adjudication motion.

V

Intentional Infliction of Emotional Distress

In her sixth cause of action, plaintiff alleges all of the defendants' conduct during her tenure in San Joaquin County was deliberate and intentional for the purpose of causing her severe emotional distress. The trial court concluded the claim was preempted by the exclusive remedy of workers' compensation. Plaintiff contends the court erred in this regard, because acts that amount to unlawful discrimination or harassment are outside the employment bargain and not preempted.

Assuming plaintiff is correct that her claim is not preempted by workers' compensation (see *Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at p. 353), the trial court also concluded the conduct alleged by plaintiff was not sufficiently extreme or outrageous to give rise to an intentional infliction claim. Plaintiff does not address this conclusion.

An essential element of a claim for intentional infliction of emotional distress is "extreme and outrageous conduct by the defendant." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593.) For conduct to be outrageous, it "must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid.*) "'[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances. The plaintiff cannot recover merely because of hurt

feelings. [Fns. omitted.]'" (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128, quoting Prosser & Keeton on Torts (5th ed. 1984) § 12, pp. 59-60.)

Even if it could be said the conduct of plaintiff's subordinates was sufficiently extreme and outrageous to give rise to a claim of intentional infliction of emotional distress, the same cannot be said of the conduct of defendants. Defendants did no more than fail to take sufficient corrective action to stop the misconduct of others. There is no evidence defendants' conduct was motivated by plaintiff's gender or by a desire to retaliate against her for asserting her right to a workplace free of discrimination. Hence, the trial court did not err in granting summary adjudication to defendants on plaintiff's intentional infliction claim.

DISPOSITION

The judgment of dismissal as to defendant McKenzie is affirmed. The judgment of dismissal for defendant El Paso is reversed and the matter remanded to the trial court with directions to vacate its order granting summary adjudication to El Paso and to enter a new order denying summary adjudication on plaintiff's hostile work environment claim and granting summary

adjudication on all other claims. Plaintiff is awarded her costs on appeal.

HULL, J.

We concur:

RAYE, Acting P.J.

ROBIE, J.